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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

ROY J. McCLELLAND, et al.,
Petitioners,
vs.
FRUCO CONSTRUCTION COMPANY,
a Corporation,
Respondent.

No. 536

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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FRUCO CONSTRUCTION COMPANY,
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No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now Roy J. McClelland et al. and respectfully petition this Honorable Court to grant and to issue its writ of certiorari directed to the United States Court of Appeals within and for the Eighth Circuit (hereinafter for convenience referred to as the court below), directing it to send to this Court for review its opinion and judgment rendered and entered November 8, 1951, rehearing in which was denied December 3, 1951, by the court below, in this cause lately pending, styled Fruco Construction Company, a corporation, appellant, v. Roy J. McClelland

et al., appellees, No. 14,826, on the docket of the court below, reversing and remanding the judgment of the United States District Court within and for the Eastern Division of the Eastern Judicial District of Missouri, in said cause in favor of petitioners and against respondent, and directing said District Court to dismiss this cause.

OPINION OF THE COURT BELOW.

The opinion of the court below in said cause of Roy J. McClelland et al. v. Fruco Construction Company, a corporation, which is by this petition sought to be reviewed, appears on pages 1164 to 1176, both inclusive, of the printed transcript of the record filed herein. Petitioners are unable at this time to include herein the citation of the opinion of the court below in said cause, in the Federal Reporter, because said opinion has not yet appeared therein.

JURISDICTION OF THE COURT.

The action here sought to be reviewed, having been brought under the Fair Labor Standards Act (52 Stat. 1060, Chapter 676, Sections 1 to 19, both inclusive, 29 U. S. C. A., Sections 201 to 219, both inclusive), the jurisdiction of this Court is based upon 62 Stat. 928, 28 U. S. C. A., Sec. 1254, providing for review of a decision of a United States Court of Appeals, in this Court by certiorari granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgment or decree. Authorities sustaining the jurisdiction are:

Powell et al. v. U. S. Cartridge Co.; Aaron v. Ford, Bacon & Davis; Creel v. Lone Star Defense Corporation, 339 U. S. 497, 94 L. Ed. 1017;

Kirschbaum Co. v. Walling, 316 U. S. 517, 86 L. Ed. 1638.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action under Fair Labor Standards Act (52 Stat. 1060, Chapter 676, Sections 1 to 19, both inclusive, 29 U. S. C. A., Sections 201 to 219, both inclusive), hereinafter sometimes called the Act, wherein petitioners seek to recover from respondent double pay for over-time actual work done as guards of a site whereat respondent under a cost-plus-a-fixed-fee contract was engaged in constructing for the United States Government what was later known as the Small Arms Plant. The pertinent coverage portions of the Act are as follows:

29 U. S. C. A., Sec. 207, provides that:

> "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section.
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

29 U. S. C. A., Section 216 (b), provides;

> "Any employer who violates Section 206 or 207 of this title shall be liable to the employee or em-

ployees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and any other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Upon a trial to a special master appointed by the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, petitioners prevailed. The report and the findings of the special master were approved by the District Court. On appeal to the United States Court of Appeals for the Eighth Circuit the judgment was reversed and the cause remanded with directions to dismiss it.

The holding of the United States Court of Appeals, hereinafter called the court below, was that (1) petitioners were not employees of respondent, but of the United States Government; (2) they were not engaged in commerce or in the production of goods for commerce, within the meaning of the Act; and (3) even though they were in respondent's employ and even though they were engaged in commerce or in the production of goods for commerce, respondent in good faith relied upon an interpretation of the Act by certain army officers that petitioners were not within the Act; and therefore petitioners were not entitled to recover under the Act.

The contract between the United States Government and respondent (R. 827 et seq.) provides that the contractor (respondent) shall furnish the labor and supplies (R. 828) for which it shall be reimbursed (R. 831, 832); that it shall be reimbursed for the cost of all public liability, employers' liability, workmen's compensation and social security costs (R. 834); that the "Contracting Officer may require the Contractor to dismiss from the work such employees as the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable" (R. 840).

The "Instructions on Labor Relations" (Exhibit E, R. 805 et seq.) promulgated by the Assistant to the Chief of Engineers place "full responsibility for the procurement and management of all labor required for the completion of the work on the Contractor" under a Cost-Plus-A-Fixed-Fee contract (R. 805); that "Employees of a Contractor under a Cost-Plus-A-Fixed-Fee Contract are not employees of the United States but are those of the Contractor, and hence subject to pertinent garnishment process of a state court of competent jurisdiction" (R. 817). Respondent paid the wages of petitioners (R. 751); deducted from petitioners' wages the taxes due under Social Security Act (42 U. S. C. A., Sec. 1107) (Supp. R. 1 and 2); admitted in its answer to petitioners' first amended complaint that petitioners were in its employ (Supp. R. 1); issued certificates to at least two members of the guards (R. 709, 710, 1084), stating that each "was employed by the Fruco Construction Company at the Small Arms Plant at St. Louis, Mo., as a Guard." Moréover, the undisputed evidence discloses that until October 12, 1941 (R. 888), respondent had a contract with Burns Detective Agency whereby the latter was to and did furnish all guards at the Small Arms Plant. Two days prior to that date a Major William H. Bell, Jr., constructing quartermaster, wrote respondent a letter direct-

ing it to "notify Burns that their contract will terminate on Sunday, October 12. Starting Monday, October 13, guards will be employed on the Fruco payroll" (R. 902, 903). On the same day Mr. Towne, constructing manager of respondent, wrote Bell that "arrangements" have been made to take over on our payroll all guards employed on the project at 12.01 a. m. Monday, October 13, 1941" (R. 899). The General Orders (Plaintiffs' Exhibit 2, R. 212, et seq.), which were promulgated by the same army officers upon whose testimony respondent now relies to prove the exact contrary, state in paragraph 4 (R. 213), that "Guards are employed by the Fruco Construction Company, but they will operate under the orders, instructions and rules as laid down by the Constructing Quartermaster, and transmitted to guards through their immediate superiors." On September 30, 1942, the United States Government for the first time took over the guarding of the Small Arms Plant, actually employed the guards and placed them under civil service (R. 260, 507, 513, 516, 518, 519, 533, 544, 567, 579, 699, Supp. R. 3). Moreover, at that time all persons desiring to enter the employ of the United States Government as guards were required to file a formal application for that employment (R. 260).

That portion of the Act which defines the terms (29 U. S. C. A., Sec. 203) defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States or any State or political subdivision of a State or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." The Act defines "employee" (Sec. 203) as "any individual employed by an employer"; and, "employ" as "to suffer or permit to work" (Id). Obviously these definitions cover the status of petitioners in their relation to respondent.

Despite all of these facts the court below has based its opinion holding petitioners were not employees of respondent upon the theory that the United States Government had the authority to hire and fire (R. 1168, 1169), the right to direct and control the manner in which the work shall be performed (R. 1169), and the right to control them (R. 1169, 1170); and that the special master and the judge of the district court "erred as a matter of law in holding that the construction guards" were employees of respondent (R. 1168).

It cannot be denied that for security reasons the army officers asserted considerable control over respondent's employees. We were in a war and the employees of respondent were stationed within an area which might well be subjected to sabotage. Necessarily, therefore, the character of the respondent's employees became of the greatest importance, especially the area guards. The "Instructions on Labor Relations" issued by the Assistant to the Chief of Engineers (R. 805 et seq.) provides for an application for employment to be signed by "Each person, before acceptance for employment on a project" (R. 805). It provides further that: "No person whose health or physical condition is such as to endanger the health or safety of himself or others on the project will be employed on the project" (R. 806); "no person who sets a maximum limit to the amount of work done by himself or by any other employee will be continued in employment" (R. 806); "no person shall be continued in employment by the Contractor when such continuance, in the judgment of the Area Engineer, or his representative, is detrimental to the best interests of the United States Government" (R. 806); "no person shall be assigned to service by the Contractor as Superintendent of Construction, Chief Engineer, Chief Purchasing Agent, Chief Accountant or similar position in the Contractor's field organization, or as principal assistant to any such person, until there has been submitted to and

approved by the District Engineer a statement of the qualifications and experience of the person proposed for such assignment" (R. 819). The contract between the United States Government and respondent provides that "The Contracting Officer may require the Contractor to dismiss from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable" (R. 840).

The evidence of both petitioners (R. 224, 225, 226, 252) and respondent (R. 701, 702) unqualifiedly shows that at all of times here involved, goods were being manufactured for commerce by McQuay-Norris. It is overwhelmingly proved that it was the duty of all of the guards to protect the McQuay-Norris building which was in operation (R. 224, 226, 263, 372, 525). Moreover, it was stipulated that the guards were to watch for fires or any injury to insulation or wires or any other tampering with wires, gas mains or steam lines all over the entire area (R. 288); to report anything wrong any guard saw in the entire area (R. 300). Even after the construction of a new building and its taking over for manufacturing purposes petitioners continued to guard it (R. 250, 251). They guarded interstate (R. 678, 679, 680, 686) telephone, gas and electric lines. Moreover, petitioners constantly guarded trucks entering and leaving the site, which were indisputably engaged in the transportation of goods in commerce between the states (R. 298, 333, 335, 339, 363, 446, 447, 555, 556, 557, 558, 703).

It was further stipulated (R. 236) that all of petitioners "operated generally under the rules which have been identified (R. 212, 219, both inclusive), different guards performing different duties under the rules, and all guards being subject to further directions and interpretations by their superiors" (R. 236). It was further stipulated that "the duty of each man was to do the general duties as-

signed by the general orders and any special orders with respect to his post" (R. 392).

This character of guarding service the court below says "had only the most tenuous relation to the production of munitions" (R. 1172).

Respondent says that it relied in good faith upon an interpretation of the Act by certain army officers who had to do with its contract with the United States Government, and that under the provisions of 29 U. S. C. A., Sec. 213, it is not liable in this action.

The army officers' position was that petitioners were what they called "administrative and supervisory employees" (Defendant's Exhibits B [R. 777] and C [R. 790, et seq.]), to whom the Act did not apply. The Act makes no such division, but is not applicable to "bona fide executive, administrative, professional," etc., employees (29 U. S. C. A., Sec. 213). Who is and who is not so employed is determined by the rules promulgated by the Administrator of the Act. These rules and definitions were promulgated by the Administrator on October 12, 1940, long before the earliest date here involved. Therefore, this determination was binding. It did not include petitioners. The division by the army officers into manual and non-manual employees and their classification contrary to law cannot form the basis for good faith action by respondent. Moreover, the army officers' illogical and arbitrary classification was not made until 1941 (R. 777), long after the authoritative definitive declarations of the Administrator, which respondent was legally bound to know and respect. Even if this were not true, no one with authority to speak for the Army made a determination. Such an interpretation is too indefinite for anyone to act in "conformity" with it, as the law demands. All persons dealing with the representatives of the United States Gov-

ernment do so at their peril, and are conclusively presumed to know that acts which are within the apparent but in excess of the actual authority of any officer are not binding upon the Government. The army is not an administrative body and in order to form a basis for a bona fide reliance upon an interpretation it must have been that of the administrative body or agency; not of someone not capable of speaking for the agency. Moreover, the opinion of the army officers was directly contrary to a decision of one of the United States District Courts in Wood v. Central Sand & Gravel Company, 33 F. Supp. 40, 45, 46, decided May 3, 1940, long before the so-called decision of the army officers, and which was binding on them as well as everyone else.

QUESTIONS PRESENTED.

I.

There are three questions determined by the court below: (1) petitioners' employment status with respondent, (2) their engagement in commerce or in the production of goods for commerce, and (3) respondent's good faith reliance upon the opinion of certain army officers that petitioners were not within the benefits of the Act. All three of these questions were determined favorably to petitioners by the special master, and by the district court, upon evidence which (1) legally permitted only inferences favorable to petitioners, (2) permitted contrary inferences, or (3) upon disputed evidence. Under such circumstances was the court below authorized to reverse the judgment of the district court:

(1) In view of the fact that there is really no substantial evidence to support a judgment against petitioners?

(2) In view of the provisions of Rules 52 (a) and 53 (e) (2) of the Federal Rules of Civil Procedure, which com-

pelled an affirmance unless the judgment of the district court was "clearly erroneous"?

(3) In view of the general rule that the court below is not a trier of the facts, but must construe them favorably to the successful litigant in the district court and affirm upon substantial evidence supporting the judgment?

In view of the analogy between this case and one tried before a jury, has not the court below in effect denied petitioners the right of trial by jury?

II.

This Court has held that the Act must be broadly construed as to the inclusion and narrowly as to the exclusion of persons subject to its provisions. Has the court below so construed it, in view of its decision upon the questions involved upon the state of the evidence in the record?

III.

Upon facts so similar as to be almost identical the controlling opinions of this Court, and those of other United States Courts of Appeals, conflict with the opinion here questioned, upon all three of the issues involved.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The three questions determinative of the issues, viz., (1) were petitioners in the employ of respondent or of the United States Government, (2) were they engaged in commerce or in the production of goods for commerce, and (3) did respondent in good faith rely upon the alleged interpretations of the Act as to its coverage of petitioners,

are determined in petitioners' favor by the lack of serious conflict in the evidence which is so overwhelmingly favorable to them that no other judgment could stand.

II.

Assuming for the sake of argument only that legally there are questions of fact the determination of which warrant a finding either way, because disputed or undisputed but warranting contrary inferences, then the determination of such facts by the special master and by the district judge were binding upon the court below. Therefore, the judgment of the court below is erroneous:

(a) The judgment of the district court was not "clearly erroneous," as required by Rule 52 (a) and by Rule 53 (e) (2) of the Federal Rules of Civil Procedure, in order that the court below should have the authority to reverse.

(b) The court below decided the case as a trier of the facts, instead of construing the evidence favorably to petitioners, as it was bound by law to do.

(c) In view of the analogy between this case and one tried to a jury, under the Federal Employers' Liability Act, for instance, the court below has in effect denied petitioners the right of trial by jury, by refusing to accept the facts favorable to them and so found by the special master as well as the district judge.

(d) Conceding questions of fact were raised by the evidence, which petitioners deny, as above stated, then the evidence simply created a choice for the fact finder between two permissible views of the weight of the evidence. Respondent's grievance in the court below was no greater than would arise in any case where the evidence would support a conclusion either way but where the special master and the trial court have decided it to weigh more heavily for petitioners. The court below, therefore, ex-

ceeded its powers when it ordered the judgment in petitioners' favor reversed and this cause dismissed.

III.

But assuming for argument that the questions of fact could be decided de novo by the court below, it was under the duty of determining the first two of the questions by interpreting the Act broadly as to the inclusion of petitioners within its benefits and narrowly as to their exclusion from its benefits. Instead of so doing the court below followed the contrary principle, in violation of controlling decisions of this Court.

IV.

As to the question of respondent's reliance in good faith upon an interpretation by certain army officers, there is not involved in the opinion of the court below, any interpretation of the Act but an interpretation of the evidence which petitioners feel overwhelmingly supports the finding of fact of the special master and of the district court. The finding of the special master, approved by the district court, on this question is so clearly one of fact rather than of law as to be binding upon the court below.

ASSIGNMENT OF ERRORS.

I.

There is no substantial evidence to support a judgment against petitioners. The evidence is so overwhelmingly favorable to them that the judgment of a trier of the facts in favor of respondent could not be permitted to stand.

II.

Rule 53 (e) (2) of the Federal Rules of Civil Procedure provides that the decision of a special master must be approved by the district judge unless it is "clearly erroneous." Obviously petitioners' judgment in the district court was not clearly erroneous. Moreover, it was approved by the district judge. The court below, therefore, had no legal authority to disturb it.

III.

The duty of the court below was to construe the evidence favorably to petitioners and to affirm upon substantial evidence supporting the judgment of the district court. This it did not do.

IV.

So far as the authority of the court below to disturb it was concerned, the finding of the special master was analgous to the verdict of a jury. It was not so treated by the court below, which in legal effect denied petitioners the right of trial by jury.

V.

Contrary to law, the court below failed to construe the Act broadly to include and narrowly to exclude persons within its orbit.

VI.

The judgment of the court below is in direct conflict with controlling decisions of this Court on the questions involved, and with decisions of other United States Courts of Appeals upon the same questions.

PRAYER.

Wherefore, petitioners pray that a writ of certiorari shall be issued by this Court, addressed to the United States Court of Appeals within and for the Eighth Judicial Circuit, directing that Court to certify to this Court, on a day certain to be named therein, a full and complete transcript of the record of proceedings in said cause of Fruco Construction Company, a corporation, appellant, versus Roy J. McClelland et al., appellees, that Court's number 14,286; to the end that the judgment of that Court herein may be reviewed by this Court, as provided by law; and that upon such review that judgment of that United States Court of Appeals herein shall be reversed and petitioners shall be granted such relief as to this Court shall seem appropriate.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The jurisdiction of this Court is clear and certain.

62 Stat. 928, 28 U. S. C. A., Sec. 1254;
Powell et al. v. U. S. Cartridge Company, 339 U. S. 497, 94 L. Ed. 1017;
Kirschbaum v. Walling, 316 U. S. 517, 86 L. Ed. 1638.

II.

There is no substantial evidence to support a finding that petitioners were not in respondent's employ, that they were not engaged in commerce or in the production of goods for commerce, or that respondent bona fide relied upon an interpretation by the United States Army that petitioners were not within the orbit of the Act.

See authorities under VIII (a), post.

III.

Rule 52 (a) of the Federal Rules of Civil Procedure provides:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment * * *."

Rule 53 (e) (2) of the Federal Rules of Civil Procedure provides:

> "In Non Jury Actions. In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous * * *."

(a) As there was substantial evidence to support the finding of facts made by the special master on the three points decided by the court below, the finding obviously was not "clearly erroneous." Rule 53 (e) (2) required an affirmance. Therefore, the decision of the court below is erroneous; and conflicts with the law as announced by this Court and the Court of Appeals for the Seventh Circuit.

Fox River Paper Corporation v. United States (7), 165 F. 2d 639, 640;

United States v. Yellow Cab Company, 338 U. S. 338, 342, 94 L. Ed. 150, 153;

Oedekerk v. Muncie Gear Works (7), 179 F. 2d 821, 824.

(b) In accordance with Rule 52 (a) of the Federal Rules of Civil Procedure, set out above, the judgment of the district court should have been affirmed; and the action of the court below is directly contrary to the holdings of this Court in:

United States v. Yellow Cab Company, 338 U. S. 338, 342, 94 L. Ed. 150, 153;

Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 689, 90 L. Ed. 1515, 1524.

(c) The same rules of decision apply to the court below as well as to the district court.

Michelsen v. Penney (2), 135 F. 2d 409, 414;

Morris Plan Industrial Bank v. Henderson (2), 131 F. 2d 975, 976, 977.

IV.

This cause came to the court below weighted in petitioners' favor by reason of the report of the special master and its approval by the district judge. Moreover, it was supported by substantial evidence. Respondent's grievance was no greater than it might have been "in any case where the evidence would support a conclusion either way

but where the trial court has decided it to weigh more heavily for the petitioners.

United States v. Yellow Cab Company, 338 U. S. 338, 342, 94 L. Ed. 150, 153.

It is not enough to warrant interference by an appellate court with the judgment of the trial court, that the former "might give the facts another construction, resolve the ambiguities differently," and find the facts otherwise differently.

United States v. National Association of Real Estate Boards, 339 U. S. 485, 495, 94 L. Ed. 1007, 1016 (citing approvingly United States v. Yellow Cab Company, 338 U. S. 338).

V.

No reason is seen why litigants should be penalized in any way in cases tried by special masters. The principle in a case tried before a jury which clothes a verdict with presumptive validity and requires the appellate court to consider the evidence favorably to the appellee obviously should apply to the case at bar, else petitioners would in effect be deprived of their right to trial by jury.

Tennant v. Peoria & Pekin Union Railroad Company, 321 U. S. 29, 35, 88 L. Ed. 520, 525;

Lavender v. Kurn et al., 327 U. S. 645, 652, 653, 90 L. Ed. 916, 922, 923.

VI.

The court below violated the principle that the Act must be broadly construed as to the inclusion of persons within, and narrowly as to the exclusion of persons from, its orbit.

A. H. Phillips, Inc., v. Walling, 324 U. S. 490, 493, 89 L. Ed. 1095, 1099;

West Kentucky Coal Company v. Walling (6), 153 F. 2d 582, 584.

VII.

The court below refused to affirm although the finding of the special master and the judgment of the district court were not "clearly erroneous"; refused to follow the provisions of Rule 52 (a) and of Rule 53 (e) (2) of the Federal Rules of Civil Procedure; did not consider the evidence favorably to petitioners; did not broadly construe the Act for the inclusion of persons within it and narrowly for their exclusion; exceeded its jurisdiction by acting as triers of the facts de novo; thereby bringing its decision into direct conflict with the controlling decisions of this Court and with those of other United States Courts of Appeals cited.

VIII.

The opinion of the court below is in direct conflict with the controlling opinions of this Court, or with opinions of other United States Courts of Appeals, on each of the three issues decided by it, viz., (1) in whose employment were petitioners, (2) were they engaged in commerce or in the production of goods for commerce, and (3) did respondent bona fide rely upon the interpretation of someone in the army that petitioners did not come within the orbit of the Act.

(a) Under the facts, stated in the Summary Statement of the Matter Involved, supra, petitioners were unquestionably in the employ of respondent during the time here involved, under the controlling decisions of this Court and under the prior decisions of the court below, as well as those of other United States Courts of Appeals.

Powell v. United States Cartridge Company, 339 U. S. 497, 94 L. Ed. 1017;

National Labor Relations Board v. E. C. Atkins & Company, 331 U. S. 398, 91 L. Ed. 1563;

National Labor Relations Board v. Jones & Laughlin Steel Company, 331 U. S. 416, 91 L. Ed. 1575;

Alabama v. King & Boozer, 314 U. S. 1, 86 L. Ed. 3;
Curry v. United States, 314 U. S. 14, 86 L. Ed. 9;
Bay Ridge Operation Company, Inc., v. Aaron et al., 334 U. S. 446, 92 L. Ed. 1502;
Durnil v. J. E. Dunn Construction Company (8), 186 F. 2d 27, 29;
Brenna v. Federal Cartridge Corporation (8), 183 F. 2d 414;
Wilson & Company v. National Labor Relations Board (8), 162 F. 2d 310, 313;
Bell v. Porter (7), 159 F. 2d 117 (certiorari denied) 330 U. S. 813, 91 L. Ed. 1267.

(b) With or without consideration of the definitions of "employer", "employee" and "employ" found in the Act, the evidence so overwhelmingly establishes that petitioners were in respondent's employ, that any contrary finding could not be permitted to stand. These facts are set out rather fully in the Summary Statement of the Matter Involved, supra, and will be discussed in detail in Argument, post.

(c) The definition of "employer" in the Act and in the National Labor Relations Act (29 U. S. C. A., Sec. 152) are legally if not factually identical. The latter says an "employer" is: "Any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State, or political subdivision thereof, or any person subject to sections 151-163 of Title 45, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." (Sections 151-163 of Title 45 provide for the exclusion from National Labor Relations Act of all railroad employees. No such exception appears in Fair Labor Standards Act.)

(d) The holding of the court below that petitioners were not in respondent's employ is directly contrary to the

"fundamental policy of the Government to refrain, as much as possible, from doing its own manufacturing and to use, as much as possible (in the production of munitions), the experience * * * that had made American industry outstanding in the world. The essence of this policy called for private, rather than public, operation of war plants."

Powell v. United States Cartridge Company, 339 U. S. 497, 506, 94 L. Ed. 1017, 1031;

Kennedy v. Silas Mason Co., 164 F. 2d 1016, 1019, 1020 (dissenting opinion of Judge Hutcherson, cited approvingly in the Powell case, supra);

Walton v. Southern Package Corporation, 320 U. S. 540, 88 L. Ed. 298.

(e) The statement in the opinion of the court below (R. 1172) that the relation of the petitioners' duties to the production of munitions was "most tenuous," is wholly unrealistic, not supported by any evidence, and directly contrary to the controlling decisions of this Court above cited.

(f) There are several legal reasons why respondent could not have bona fide relied upon any interpretation made by any officer of the army. If for argument only the presumption should be indulged that some member of the armed forces were authorized to interpret the Act, respondent could not have bona fide relied upon that interpretation, for the purpose of excluding petitioners from the provisions of the Act.

(f-1) Respondent did not rely and could not have bona fide relied upon the opinion of the various army officers as to whether or not petitioners were within the provisions of the Act. "Good faith" does not mean blind reliance upon what someone in the army told someone in respondent's employ; but means "a state of mind charac-

terized by honesty of purpose, freedom from intention to be unfair, and the absence of known or readily discoverable facts which would lead to further inquiry."

Kam Koom Wan v. E. E. Black, Limited, 75 F. Supp. 553, 561.

(f-2) The district court of Tennessee on May 3, 1940, long before petitioners' rights accrued, held that a watchman protecting goods in commerce was within the beneficence of the Act.

Wood v. Central Sand & Gravel Co., 33 F. Supp. 40, 45, 46.

(f-2-a) Thereafter there could not have been any bona fide contrary belief by respondent.

Fred Wolferman, Inc., v. Gustafson (8), 169 F. 2d 759, 765;
Alicea v. Puerto Rico Gas & Coke Co., 89 F. Supp. 938.

(f-3) By the terms of the Act, the definitions of "executive" and "administrative" promulgated October 12, 1940, by the Administrator of the Wage and Hour Division (29 U. S. C. A. 541, Appendix), have the force and effect of law.

Walling v. Yeakley (10), 140 F. 2d 830, 832;
Helliwell v. Haberman (2), 140 F. 2d 833, 834;
Marchant v. Sands, Taylor & Wood Company, 75 F. Supp. 783, 785, 786.

(f-3-a) The Administrator's definitions and the definitions of the army are in direct conflict, as the latter divides employees into but two classes, manual and non-manual (R. 790, 791), and says that all of the latter class are "administrative and supervisory employees" (R. 777, 790). Under these circumstances obviously the definitions of the Administrator must be controlling, and there could have

been no bona fide reliance upon the conflicting army definitions, as the Administrator's were the "law". No such anomaly exists as a bona fide violation of the law.

(g) The army obviously is not an "agency" of the United States, as that term is used in the Act.

The Federal Reports Act, 5 U. S. C. A., Sec. 139 (e);
The Administrative Procedure Act, 5 U. S. C. A., Sec. 1001;
The Federal Register Act, 44 U. S. C. A., Sec. 304.

(g-1) Every "agency" of the Government must be in aid of the executive rather than of the judicial or legislative department of the Government; it must be invested with real authority to act for the United States in the actual administration of the acts of Congress. Obviously the army does not meet these requirements.

(g-1-a) It is completely under the control of the chief executive as its commander-in-chief. His decisions are final and, of course, unappealable. This is wholly contrary to the basic theory of an "agency" of the Government.

(g-1-b) To form a basis for reliance upon the action of an "agency" the agency must be an "appropriate" one.

Day & Zimmerman v. Reid (8), 168 F. 2d 356, 360.

(g-1-b-1) Obviously the army is not an "appropriate" agency to interpret the Fair Labor Standards Act.

Jackson v. Northwest Airlines, 76 F. Supp. 121, 127, 128.

(h) In view of the fact that the contract between the United States Government and respondent is signed by representatives of the army, it would be wholly unconscionable to make the interpretation of one of the parties binding upon the other, especially when it is contrary to a judicial decision. It is impossible to believe that Congress in-

tended to turn over to the army the judicial authority to interpret contracts.

(i) But even conceding for the sake of argument that the army could legally interpret the Act, (1) was its interpretation intrinsically unsound; and if not (2) was it authoritative? These in their order.

(i-1) The interpretation of the Act by the army was based upon the premise that there are but two classes of employees, viz., manual and non-manual (R. 780, 790, 791); that all non-manual employees are "administrative and supervisory employees" (Defendant's Exhibit B, p. 777, and Defendant's Exhibit C, p. 790 et seq.). Petitioners were classified as non-manual employees (R. 777, 937). Therefore, "administrative and supervisory," and not within the Act.

(i-2) The interpretation is too vague and illogical to furnish a basis for bona fide reliance upon it.

(i-3) The classification of petitioners as non-manual, and therefore "administrative and supervisory" employees is not only arbitrary, but is wholly unsound as well.

(i-3-a) It is shown in Defendant's Exhibit B (R. 777) that the interpretation of the officers of the army was based upon the stated theory that "the Wage and Hour Act applies specifically to employees 'engaged in commerce or in the production of goods for commerce' and, therefore, it does not make it obligatory upon the constructors to pay overtime to administrative and supervisory employees." This is meaningless unless it means that the basis for the statement is that petitioners were not engaged in commerce or in the production of goods for commerce.

The same is true of Defendant's Exhibit C (R. 936, 937), where it is said:

"The Wage and Hour Act applies specifically to employees 'engaged in commerce or in the production of goods for commerce,' and with this in view it is apparent that administrative and office personnel cannot be paid overtime using as an authority the provisions of the above-mentioned Act."

(i-3-b) Respondent could not have bona fide relied upon these so-called interpretations of the Act. They were directly in conflict with Wood v. Central Sand & Gravel Co., 33 F. Supp. 40, supra; they were based upon an unwarranted classification of respondent's employees into manual and non-manual, and a decision by someone in the army that petitioners were non-manual employees, and were, therefore, "administrative and supervisory" employees. Respondent could not bona fide have accepted these opinions as sound.

(i-4) Conceding for argument that the army was an "agency", which could interpret the Act, and that its interpretation was not inherently unsound, was it authoritative? Was it promulgated by someone in the "agency" with authority to speak for it?

(i-4-a) To be effective, the promulgation must be by someone who has authority to speak for the "agency". So far as this record shows (R. 936, 937) the highest ranking officer who had anything to do with the interpretation of the Act so far as this interpretation is concerned was a brigadier general, who was assistant quartermaster general. It can scarcely be contended with reason that he had authority to speak for the entire army. Congress intended that the person who spoke for the "agency" should have the authority to make his interpretation the agency's.

1947 Congressional Record, pp. 1550, 1620, 4398, 4514, 4515, 4578.

(i-4-b) Except for specific statutory authority subordinate government officials have no power to exercise discretion.

United States v. Watashe, 102 F. 2d 428, 431.

(i-4-b-1) Moreover, all persons dealing with public officials are bound to know that they do so at their peril; and the acts of such officers, even though within their apparent authority, are not binding if in excess of their actual authority.

United States v. Foster, 131 F. 2d 3;
United States v. Buescher, 131 F. 2d 3.

ARGUMENT.

I.

This Court has accepted jurisdiction of so many cases of this character, including Powell v. United States Cartridge Company, 339 U. S. 497, 94 L. Ed. 1017, and Kirschbaum v. Walling, 316 U. S. 517, 86 L. Ed. 1638, that it seems scarcely necessary to argue the matter further. It is believed respondent will not question this Court's jurisdiction.

II.

It seems advisable to here discuss briefly whether or not petitioners are entitled to prevail as a matter of law rather than a matter of fact. Whether or not they are entitled to recover as a matter of fact will be discussed under division VIII, post. The authorities supporting both positions are, for convenience, cited, post.

(a) So far as the relationship between petitioners and respondent is concerned, there is no substantial evidence to support the conclusion of the court below. As a matter of law it is erroneous. The facts supporting this conclusion have been rather fully stated in the Summary Statement of The Matter Involved, supra, and need not be repeated here. They apparently were overlooked by the court below which reached the conclusion that the Government had the right to hire and fire petitioners and to control their work, and, therefore, was their employer. But in so doing that court overlooked, among other things, the provisions of the "Instructions on Labor Relations" (R. 805 et seq.) as well as the contract between respondent and the United States (R. 827 et seq.), both of which showed clearly that petitioners were not in the employ of the United States.

The "Instructions" provided (R. 806) that: "No person shall be continued in the employment by the Contractor when such continuance, in the judgment of the Area Engineer, or his representative, is detrimental to the best interests of the United States Government." The contract provided (R. 840) that:

> "The Contracting Officer may require the Contractor to dismiss from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable."

These provisions are not limited to petitioners but cover every employee respondent had working on the job covered by the contract. The phrase "or otherwise objectionable" is not limited in any way. The basis of the opinion of the court below is cut out from under the opinion by these provisions, unless it is to be held that not a single person who worked on this job was not in respondent's employ. Such a conclusion would, of course, be wholly fanciful.

(b) It is difficult to understand the holding of the court below that petitioners' connection with commerce was of "only the most tenuous" character (R. 1172). During the entire period here involved petitioners guarded (R. 224, 226, 263, 372, 525, 553) the building of McQuay-Norris which at all times was engaged in processing munitions for the Government. The evidence of petitioners and respondent so shows (R. 224, 225, 226, 252, 701, 702). The parties stipulated petitioners were under a duty to guard the entire site (R. 300), and to guard interstate telephone wires, interstate gas mains, interstate electric lines (R. 288). The uncontradicted evidence so shows also (R. 678, 679, 680, 686). Petitioners constantly guarded trucks entering and leaving the site and which were indisputably engaged in the transportation of goods in commerce between the states (R. 298, 233, 335, 339, 363, 446, 447, 555,

556, 557, 558, 703). Under this Court's holding in the Powell Case, supra, this evidence overwhelmingly shows that petitioners were engaged in commerce.

(c) There remains for discussion whether or not as a matter of law respondent's defense grounded upon its claim of a bona fide reliance upon the interpretation of the Act by certain army officers, is sound.

There are various reasons forbidding respondent's reliance in good faith upon such interpretations: (1) the district court of Tennessee had already determined the question to the contrary in Wood v. Central Sand & Gravel Company, 33 F. Supp. 40, 45, 46, after which no one could bona fide rely upon the army's interpretation. Fred Wolferman, Inc., v. Gustafson (8), 169 F. 2d 759, 765; Alicea v. Puerto Rico Gas & Coke Co., 89 F. Supp. 938. (2) The Administrator of the Wage and Hour Division had authoritatively and contradictorily defined who were and were not "executive" and "administrative" employees under the Act (29 U. S. C. A. 541, Appendix). This definition became the "law". Walling v. Yezkley (10), 140 F. 2d 830, 832; Helliwell v. Haberman (2), 140 F. 2d 833, 834; Marchant v. Sands, Taylor & Wood Company, 75 F. Supp. 783, 785, 786. (3) The army is not such an "agency" of the Government as might interpret the Act. (4) If it were, the interpretation was not made by anyone with authority to act for the army.

III.

But even if it be conceded that petitioners were not entitled to a peremptory judgment, then the decisive questions were of fact rather than of law, were decided by both the special master and the district judge, whose findings were not "clearly erroneous," were binding upon the court below and are binding upon this Court.

Rule 52 (a) of the Federal Rules of Civil Procedure provides:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment * * *."

Rule 53 (e) (2) of the Federal Rules of Civil Procedure provides:

> "In Non Jury Actions. In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous * * *."

(a) That there was substantial evidence to support the findings of fact made by the special master and by the district judge does not admit of doubt. Many of the facts have been set out supra, respecting the three decisive questions involved, viz., (1) whose employees were petitioners, (2) were they engaged in commerce or the production of goods for commerce, and (3) did respondent bona fide rely upon the opinion of certain army officers that petitioners did not come within the benefits of the Act.

The situation here is well described by this Court in United States v. Yellow Cab Company, 338 U. S. 338, 342, 94 L. Ed. 150, 153, where it said that the Government had "failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court had decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous.'"

The United States Court of Appeals for the Seventh Circuit in Fox River Paper Corporation v. United States (7), 165 F. 2d 639, 640, said that its duty was to determine only whether or not the finding of the trial court was clearly

erroneous; and that it was not clearly erroneous "if there is substantial evidence to support it. We consider only the evidence that supports the court's finding. We do not weigh the evidence or resolve any conflicts therein or consider the credibility of the witnesses."

(b) The court below has clearly violated Rule 52 (a) of the General Rules of Civil Procedure, as applied by this Court in an action under the act. This Court has said in Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 689, 90 L. Ed. 1515, 1524:

> "On the issue as to the extent of the actual productive work performed, we are constrained to agree with the special master that it began and ended at the scheduled hours. This was purely a factual issue. The master made his findings in this respect through the weighing of conflicting evidence, the judging of the reliability of witnesses and the consideration of the general conduct of the parties to the suit. The master thereby concluded that productive work did not begin before the scheduled hours except in a few instances which were counterbalanced by occasions when work began after the scheduled hours or ended before the scheduled cessation of productive work. Our examination of the record leads us to acquiesce in these findings since they are supported by substantial evidence and are not clearly erroneous. And the court below correctly held that the District Court erred in failing to accept these findings and in creating a formula of compensation based upon a contrary view. Rule 53 (e) (2) of the Federal Rules of Civil Procedure. See Tilghman v. Proctor, 125 U. S. 136, 139, 150, 31 L. Ed. 664, 668, 669, 8 S. Ct. 894; Davis v. Schwartz, 155 U. S. 631, 636, 637, 39 L. Ed. 289, 291, 293, 15 S. Ct. 237."

IV.

This cause came to the court below weighted by the findings of fact made by the special master and approved by the district judge favorable to petitioners. The judgment of the district court was clearly and overwhelmingly supported by the evidence. Respondent's grievance could not have been any greater than it might have been "in any case where the evidence would support a conclusion either way but where the trial court" had "decided it to weigh more heavily for" petitioners. Under these circumstances this Court holds in United States v. Yellow Cab Co., 338 U. S. 338, 342, 94 L. Ed. 150, 153, the court below had no power to render the judgment now attacked.

An examination of the opinion of the court below will disclose that instead of accepting the findings of facts by the special master and by the district court, it acted as the trier of the fact, reached the opposite conclusion from the special master and the district judge, and decided the case accordingly. This Court says in United States v. National Association of Real Estate Boards, 339 U. S. 485, 495, 94 L. Ed. 1007, 1016, citing approvingly United States v. Yellow Cab Company, 338 U. S. 338, an appellate court cannot interfere with the judgment of a trial court merely because the appellate court "might give the facts another construction, resolve the ambiguities differently," and otherwise find the facts differently.

V.

As above stated numerous times, this cause was tried before a special master. No reason is seen why litigants who try their cases before a special master appointed by the court, should lose the benefits which accompany a trial before a jury. Doubtless the recognition of the fairness of such a contention resulted in the adoption of Rules

52 (a) and 53 (e) (2) of the Federal Rules of Civil Procedure. This Court recognized the fairness of treating on appeal the litigants in causes tried before the judges without juries in the same manner they would have been treated had their cases been tried before juries. United States v. Yellow Cab Company, 338 U. S. 338, 342, 94 L. Ed. 150, 153.

Therefore, the same rule should be applied as this Court applies in cases under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65).

This Court said in Tennant v. Peoria & Pekin Union Railroad Company, 321 U. S. 29, 35, 88 L. Ed. 520, 525, in deciding a case under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65):

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contrary evidence and inferences, judges the credibility of the witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its functions is to select from any conflicting inferences and conclusions that which it considers most reasonable. (Citing cases.) That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In discussing the same subject in the later case of Lavender v. Kurn, 327 U. S. 645, 652, 653, 90 L. Ed. 916, 922, 923, this Court said:

> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it would reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to litigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury." (Citing cases.) * * *
>
> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that a court might draw a contrary inference or feel that another conclusion is more reasonable."

VI and VII.

The court below violated the principle established by this Court and by the Court of Appeals for the Sixth Circuit, that the Act must be construed broadly for inclusive purposes and narrowly for exclusive purposes. A. H. Phillips, Inc., v. Walling, 324 U. S. 490, 493, 89 L. Ed.

1095, 1099, and West Kentucky Coal Company v. Walling (6), 153 F. 2d 582, 584. It will not, or at least should not, be denied that a broad construction of the facts in this record compels a finding that petitioners were within the orbit of the Act.

The court below refused to affirm petitioners' judgment although it obviously was not "clearly erroneous," under the decisions of this Court and of other United States Courts of Appeals. In so doing it not only created conflict of opinion, but it also failed to follow the provisions of Rules 52 (a) and 53 (e) (2) of the Federal Rules of Civil Procedure. It did not consider the evidence favorable to petitioners, but did consider what it considered to be evidence unfavorable to them, and based its opinion thereon. It narrowly rather than broadly construed the Act as to the inclusion of petitioners within its effect, and exceeded its jurisdiction by acting as triers of the facts. All of these errors bring the opinion in direct conflict with the controlling opinions of this Court heretofore discussed.

VIII.

At the risk of repetition it is desired to discuss in detail the conflict between the decision of the court below and the controlling decisions of this Court, as well as its conflict with its own decisions and those of other courts of appeals, upon whether or not petitioners were employees of respondent, and engaged in commerce or the production of goods for commerce.

(a) Were petitioners employees of respondent or of the United States Government? This Court's decisions cited under VIII of the Summary of Argument, supra, have set forth the governing principles for the answer to the question. In the Powell Case which reached this court from the same court of appeals, this Court made it plain that

under the facts of record here, the employees were to be considered those of the contractor rather than of the United States Government. The court below followed those principles in Durnil v. J. E. Dunn Construction Company, 186 F. 2d 27, 29, and in Brenna v. Federal Cartridge Corporation, 183 F. 2d 414.

(b) Even though it should be conceded for the purpose of argument that under the ordinary legal principles of master and servant, petitioners were not employees of respondent, yet under the Act which defines "employer," "employee" and "employ", it is unmistakably clear that petitioners were in respondent's employ.

29 U. S. C. A., Sec. 203:

> "(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent or such labor organization."
>
> "(e) 'Employee' includes any individual employed by an employer."
>
> "(g) 'Employ' includes to suffer or permit to work."

29 U. S. C. A., Sec. 207:

> "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> "(1) for a work week longer than forty-four hours during the first year from the effective date of this section * * * (3) * * * unless such employee receives

compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Clearly the evidence established beyond the possibility of doubt and respondent acted "directly or indirectly in the interest of an employer in relation to" petitioners, by paying their wages, deducting Social Security taxes, certifying their availbility for other employment and other similar acts. Just as obviously it suffered and permitted them to work.

The opinion of the Court below in effect says that under the record evidence respondent did not act "directly or indirectly in the interest of an employer in relation to" petitioners, and that it did not "suffer or permit" them to work. Unless it can be said as a matter of law that this is true, then the opinion of the court below is in the face of this Act of Congress. Will this Court so say?

(e) The National Labor Relations Act (29 U. S. C. A., Sec. 152) defines "employer" as "any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State, or political subdivision thereof, or any person subject to sections 151-163 of Title 45, or any labor organization (other when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization" (Sections 151-163 of Title 45 provide for the exclusion from that act of all railroad employees, whereas the Act does not).

In National Labor Relations Board v. E. C. Atkins & Company, 331 U. S. 398, 91 L. Ed. 1563, and National Labor Relations Board v. Jones & Laughlin Steel Company, 331 U. S. 416, 91 L. Ed. 1575, this Court held that even a militarized guard corps, auxiliary to the military police, was in the employ of the contractor and not of the United

States Government. In those cases a guard was subject to call for military service in emergencies; he was compelled to stand military drill at least one hour a week and more if approved by plant management; he in writing agreed to support and defend the constitution, bear true faith and allegiance to it, and faithfully discharge his duties as a civilian auxiliary to the military police. Moreover, he agreed that the appropriate Articles of War had been read to him, and that he should be subject to military law during his employment, and could thereby be courtmartialed. None of these attributes to employment appears in the case at bar.

The question in those cases was whether or not the employees would be permitted to join a labor union. If employees of the contractor, the answer would be in the affirmative; if of the United States, the answer would be in the negative. This Court in those cases, and the court below in Wilson & Company v. National Labor Relations Board, 162 F. 2d 310, 313, held that the employees there involved were not employees of the United States and could, therefore, join the labor unions. If those decisions are correct, then obviously petitioners were not employees of the United States. It can scarcely be argued that petitioners were employees of respondents for the purpose of joining a labor union but not for recovering under the Act.

(d) The holding of the court below that petitioners were not in respondent's employ is directly contrary to the policy of the Government under the circumstances and the Act here involved. In discussing this question this Court said in Powell v. United States Cartridge Company, 339 U. S. 497, 506, 94 L. Ed. 1017, 1031:

> "For example, we find in these contracts a reflection of the fundamental policy of the Government to refrain, as much as possible, from doing its own manu-

> facturing and to use, as much as possible (in the production of munitions), the experience in mass production and the genius for organization that had made American industry outstanding in the world. The essence of this policy called for private, rather than public, operation of war plants. * * * It would have been simple for the Government to have ordered all of this production to be done under governmental operation as well as governmental ownership. To do so, however, might have weakened our system of free enterprise. * * * In this light, the Government deliberately sought to insure private operation of its new munitions plants."

(e) The statement of the Court below (R. 1172) that the relation of petitioners' duties to the production of munitions was "most tenuous," is entirely unrealistic, and is contradicted by the undenied evidence (R. 224, 226, 233, 263, 252, 298, 333, 335, 339, 363, 446, 447, 555, 556, 557, 558, 703).

It will be noticed that in the opinion of the court below (R. 1171, 1172), it is said that "The appellee construction guards could not enter the premises under the jurisdiction of the operating guards without a permit." This statement is technically correct, but does not present the correct picture, as the undisputed evidence shows that even after a building had been completed and special guards stationed in it, petitioners continued to guard it from the outside (R. 251, 252, 328, 329, 342, 353, 371). Petitioners at all times guarded and protected the entire plant site, including gates, interstate trucks, gas, telephone and electric lines (R. 212, 251, 263, 264, 266, 288, 295, 301, 315, 329, 351, 367, 372, 377, 384, 391, 392, 393, 404, 422, 433, 499, 541, 553). They were not merely "construction" guards.

Throughout the opinion of the court below (R. 1168, 1169, 1171, 1172) petitioners are spoken of as "construc-

tion guards" despite the fact that they guarded not only the buildings under construction, but also those completed and in which munitions were being made; trucks passing in and out of the site in interstate commerce, gas mains, telephone and electric lines for another state, and the entire site, as above demonstrated.

The opinion of the court below on this point is contrary to the controlling opinions of this Court in the Powell and Walton Cases, supra.

(f) Respondent pleaded in defense of this action that it had relied in good faith upon the opinion of the army officers that petitioners were not within the orbit of the Act, in view of 29 U. S. C. A., Sec. 258, which provides that it shall be a defense to an action brought under the Act if defendant shall plead and prove that * * * "the act or omission complained of was in good faith in conformity with and in reliance upon any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belongs. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. May 14, 1947, c. 52, Sec. 9, 61 Stat. 88."

Respondent did not and could not have bona fide relied upon the opinion of the various army officers as to whether or not petitioners were within the provisions of the Act.

(f-1) "Good faith" does not mean blind reliance upon what somebody in the army told someone in respondent's employ; but means "a state of mind characterized by hon-

esty of purpose, freedom from intention to be unfair, and the absence of known or readily discoverable facts which would lead to further inquiry." Kam Koom Wan v. E. E. Black, Limited, 75 F. Supp. 553, 561.

The court below holds (R. 1173 et seq.) that the special master "concluded that under the evidence the appellant (respondent) was not as a matter of law 'within the provisions of Section 9 of the Portal to Portal Act of 1947' nor of Section 11 thereof, 'and is not relieved of liability by reason thereof' " (R. 1174). This statement is correct (R. 194) so far as it goes; but the court below apparently overlooked the fact that the special master found as a fact also (R. 193): "That the Defendant had no reasonable grounds for believing and did not in good faith believe that its act or omission to pay the overtime to which the Plaintiffs found entitled to recover above were entitled under the Fair Labor Standards Act, and was not a violation of that Act."

Petitioners feel [See Argument II (c), supra] that as a matter of law the evidence does not sustain respondent's claim of bona fide reliance upon the interpretation of the Act by certain army officers. But in this portion of the brief it will be assumed that the question is not one of law but of fact as the United States Court of Appeals for the Sixth Circuit in Lassiter v. Guy F. Atkinson Co., 176 F. 2d 984, 993, holds.

The finding of facts by the special master (R. 193), approved by the district court, was binding upon the court below unless "clearly erroneous." It not only was not "clearly erroneous," but it was not even erroneous.

(f-2) It had already been decided by the district court of Tennessee, in Wood v. Central Sand & Gravel Co., 33 F. Supp. 40, 45, 46, that petitioners were within the orbit of the Act. Thereafter there could be no bona fide belief to

the contrary. Fred Wolferman, Inc., v. Gustafson (8), 169 F. 2d 759, 765; Alicea v. Puerto Rico Gas & Coke Co., 89 F. Supp. 938. It is interesting to note that the court below promulgated the Wolferman opinion.

(f-3) Under the Act the definitions of "executive" and "administrative" employees promulgated by the Administrator have the force of law. Walling v. Yeakley (10), 140 F. 2d 830, 832; Helliwell v. Haberman (2), 140 F. 2d 833, 834; Marchant v. Sands, Taylor & Wood Co., 75 F. Supp. 783, 785, 786.

29 U. S. C. A., Sec. 213, provides:

> "(a) The provisions of sections 206 and 207 of this title shall not apply with respect to (1) any employee in a bona fide executive, administrative, professional, or local retailing capacity * * * (as such terms are defined and delimited by regulations of the Administrator) * * *."

Subpart A of General Regulations, Sec. 541.1, says:

> "The term 'employee employed in a bona fide executive * * * capacity' in section 13 (a) (1) of the Act shall mean any employee:
>
> "(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
>
> "(b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> "(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> "(d) Who customarily and regularly exercises discretionary powers; and

"(e) Who does not devote more than 20 per cent of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: Provided, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20 per cent interest in the enterprise in which he is employed * * *."

Section 541.2 is as follows:

"The term 'employee employed in a bona fide * * * administrative * * * capacity' in section 13 (a) (1) of the Act shall mean any employee:

"(a) Whose primary duty consists of the performance of office or non-manual field work directly related to management policies or general business operations of his employer or his employer's customers; and

"(b) Who customarily and regularly exercises discretion and independent judgment; and

"(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations in this subpart), or

"(2) Who performs under only general supervision, work along specialized or technical lines requiring special training, experience or knowledge, or

"(3) Who executes under only general supervision special assignments and tasks; and

"(d) Who does not devote more than 20 per cent of his hours worked in the workweek to activities which are not directly and closely related to the per-

formance of the work described in paragraphs (a) through (c) of this section * * *."

These regulations were promulgated on the 12th day of October, 1940.

(f-3-a) The army officers upon whose definitions respondent claims to have relied, divided respondent's employees into two classes, manual and non-manual (R. 790, 791). They then said that all non-manual employees were "administrative and supervisory" employees (R. 777, 790). They then said that petitioners were non-manual employees (R. 776), and, therefore, were "administrative and supervisory" employees. Consequently they were without the effect of the Act which excluded "executive" and "administrative" employees. However, it is perfectly clear that petitioners did not fall within the group classified by the Administrator as "executive" or "supervisory" employees. His definitions were in effect law which was binding on respondent and which the army officers could not set aside. There can be no bona fide violation of the law.

(g) Moreover, it is obvious that the army is not such an "agency" of the United States, as that term is used in the Act, as gives it the right to make the ruling said by respondent to have been relied on in good faith to avoid the penalties of the Act.

The Federal Reports Act, 5 U. S. C. A., Sec. 139 (e), defines "Federal Agency" to mean "any executive department, commission, independent board, any corporation owned or controlled by the United States, board, bureau, division, service, office, authority or administration of the executive branch of the government; but such terms shall not include the general accounting office nor the governments of the District of Columbia and of the territories

and possessions of the United States and the various subdivisions of such governments."

The Administrative Procedure Act, 5 U. S. C. A., Sec. 1001, defines "agency" to mean "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts or the governments of the possessions, territories or the District of Columbia."

The Federal Register Act, 44 U. S. C. A., Sec. 304, defines "Federal Agency" to mean "the President of the United States or any executive department, independent board, establishment, bureau, agency, institution, commission or separate office of the administrative branch of the Government of the United States, and not the legislative or judicial branches of the Government."

It is clear that the army does not meet the requirements for an "agency" of the Government, which must be a body in aid of the executive rather than the judicial or legislative branches of the Government. The army is under the control of the President as commander-in-chief whose decisions are final and unappealable. These distinctions clearly show that the claim that the army was such an agency is contrary to the basic theory of an "agency" of the Government as that term is used in the Act.

Under the Act the opinion must be one promulgated by an appropriate agency. The court below so stated in Day & Zimmerman v. Reid (8), 168 F. 2d 356, 360. Obviously the army is not such an agency. It is difficult to imagine an arm of the Government less suited to interpret this industrial act than the army.

(h) But laying aside all other reasons, it would be wholly unconscionable to permit the army to interpret the Act so as to make it applicable or inapplicable to persons

employed under a contract to which it is one of the signatories. It has no more right to interpret a contract it has with an individual than has the individual.

(i) But if it were to be conceded for argument that the army is such an "agency", its interpretation is so unsound and illogical as to be wholly insufficient to warrant its acceptance bona fide by anyone interested, and it was not made by anyone with authority to speak for the army.

Its classification of employees into but two kinds, manual and non-manual (R. 780, 790, 791), is not sound, and when it says (R. 777, 790 et seq.) that all non-manual employees are "administrative and supervisory," the interpretation becomes wholly arbitrary and thoroughly unreliable and unrealistic.

Moreover, the interpretation is too vague and illogical to furnish a basis for a bona fide reliance upon it. To say that merely because one is a non-manual worker he is acting in an "administrative and supervisory" capacity is entirely unreasonable. What about office employees? The army said (R. 777, 936, 937) that the Act applies specifically to employees "engaged in commerce or in the production of goods for commerce," and that, therefore, respondent need not pay overtime under the Act. Unless the basis for this statement is that petitioners were neither engaged in commerce nor in the production of goods for commerce, it is wholly meaningless. If it does mean that, then it is directly in the face of the opinion in the case of Wood v. Central Sand & Gravel Company, 33 F. Supp. 40, 45, 46. Army officers cannot overrule the decision of a district court of the United States, of whose decision both they and respondent are conclusively presumed to have known.

But if it should be conceded, for argument, that the army was an "agency" within the meaning of the Act, and that its interpretation was not unsound or illogical or

contrary to the law as established in the Wood case, supra, the interpretation was not promulgated by anyone with authority to speak for it. For that reason alone no bona fide reliance could have been placed on it by respondent. The Congressional Record, pages 1550, 1620, 4398, 4514, 4515, 4578, establishes conclusively the intention of Congress that every binding interpretation of the Act should be made by someone with authority to speak for the "agency" which promulgated the ruling. This was not done in the case at bar.

Any person dealing with a representative of the Government (accepting for the moment the contention that the army was such an "agency" or representative) does so at his peril (United States v. Foster, 131 F. 2d 3; United States v. Buescher, 131 F. 2d 3), as no representative of the Government has any power to use his discretion, but must act strictly within his statutory powers. United States v. Watashe, 102 F. 2d 428, 431. For this additional reason respondent could not ignore the Woods Case, supra, and rely upon the interpretation of the army officers, who had no specific authority to make such an interpretation.

For the above reasons, petitioners have been deprived of their rights given by the Act; the opinion of the court below is contrary to the controlling decisions of this Court, as well as in conflict with the decisions of other United States Courts of Appeals decisions cited, supra. The questions are of importance, the conflicts undeniable, and the rights of petitioners plain.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

ROY J. McCLELLAND et al.,
Petitioners,
vs.
FRUCO CONSTRUCTION COMPANY,
a Corporation,
Respondent.

No. 536.

BRIEF

Of Respondent, Fruco Construction Company, in Opposition to Petition for Writ of Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

ROY J. McCLELLAND et al., Petitioners, vs. FRUCO CONSTRUCTION COMPANY, a Corporation, Respondent.	No. 536.

BRIEF

Of Respondent, Fruco Construction Company, in Opposition to Petition for Writ of Certiorari.

OPINION BELOW.

The judgment of which petitioners seek review by certiorari was entered by the United States Court of Appeals for the Eighth Circuit on November 8, 1951. The opinion is reported in Advance Sheet No. 4 of 192 Fed. (2d) on pages 241-247.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 8, 1951 (R. 1164). A petition for rehearing filed on November 21, 1951 (R. 16), was denied December 3, 1951 (R. 1193). The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254 (1).

QUESTIONS PRESENTED.

The petition (pp 10-11) sets out three questions for the consideration of the Court, but they deal primarily with the merits and fail to properly identify the basic questions involved in this petition, namely:

I.

Did the Court of Appeals err in holding that under certain undisputed material evidentiary facts recited in its opinion the District Court erred as a matter of law in its Findings and decision?

II.

Is there a conflict between the decision of the Court of Appeals and decisions of this Court or of other Courts of Appeals?

III.

Is there any new issue of Federal Law of sufficient importance to justify the issuance of the writ on that ground alone?

STATEMENT OF THE CASE.

The instant case involves an action by petitioners, who were employed at the St. Louis Ordnance Plant site as construction guards between October 13, 1941, and September 30th, 1942, during which period the plant was in process of construction, to recover from respondent a C. P. F. F. Construction Contractor, overtime compensation, liquidated damages, a reasonable attorneys' fee, interest and costs, under the Fair Labor Standards Act (52 Stat. 1060, Chapter 676, Sections 1 to 19, inclusive, 29 U. S. C. A., Sections 201 to 219, Inclusive [R. 1-143]). Respondent interposed the following defenses, among others:

(1) That none of the petitioners was an employee of respondent;

(2) That even if petitioners could be considered employees of respondent they were not within the purview of the Fair Labor Standards Act for the reason that persons employed by a cost-plus-fixed-fee contractor during the original construction of a building to guard the premises are not "engaged in commerce" or in the "production of goods for commerce";

(3) That respondent's omission to pay the overtime compensation claimed was in good faith in conformity with and in reliance upon administrative regulations, orders, rulings, approvals, interpretations, administrative practices and enforcement policies of an agency of the United States and, therefore, petitioners were barred from maintaining their action by the express provisions of the Portal-To-Portal Act of 1947 (Chapter 52, Section 9, 61 Stat. 88, 29 U. S. C. A., Section 258) (R. 143-152).

The Court of Appeals held that under certain undisputed material evidentiary facts set forth in its opinion

the Special Master and the District Court had erred as a matter of law in rejecting each of the aforementioned defenses (R. 1164-1176).

In the instant case there are no disputed evidentiary facts. Those relied on by the Court of Appeals as a basis for its decision and recited in detail in its opinion are undisputed. Those mentioned in petitioners' application for a writ of certiorari are also undisputed. None of them could have changed the course of the opinion of the Court of Appeals. Though undisputed they were deemed by the Court of Appeals to be immaterial and therefore of no force to change the result. The undisputed facts detailed in the Court's opinion and forming the basis of its decision on the three vital points in the case before the Court of Appeals impelled the decision of that Court on each of the points as determined in the opinion regardless of any of the additional undisputed and immaterial facts described in the petition for writ of certiorari.

SUMMARY OF THE ARGUMENT.

I.

The decision of the Court of Appeals, that under the undisputed material evidentiary facts set forth in its opinion petitioners were not employees of respondent contractor, was and is clearly right.

Bartels v. Birmingham, 332 U. S. 126, 130, 67 S. Ct. 1547, 1550, 91 L. Ed. 1947 (1947);

Patton et al., Appellants, v. Roane-Anderson Company, Incorporated, Appellee (December 14, 1951; C. C. A. 6th), reported in C. C. H. Labor Law Service, under paragraph 66, 675*;

Cosmopolitan Shipping Co. v. McAllister, 337 U. S. 783, 800, 69 S. Ct. 1317, 93 L. Ed. 1692 (1949);

Lewis et al. v. Virginia Engineering Co., Inc., 80 Fed. Supp. 886, 887 (1947; United States District Court, E. D. Virginia).

A.

And there is no conflict between the decision of the Court of Appeals on the point as to whether petitioners were "employees of respondent" and the decision of the Court in any of the cases relied upon by petitioners (cited by reference in Point II on page 16 of Petitioners' Brief to authorities cited under Point VIII on pages 19 and 20 of their Brief).

II.

The decision of the Court of Appeals that under the undisputed material evidentiary facts mentioned in its opin-

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* The opinion of the Court in the Patton case, supra (not yet officially published), is set out in the Appendix.

ion petitioners were not engaged in production of goods for commerce was and is clearly right.

Hartmaier et al. v. Long et al., 361 Mo. 1151, 238 S. W. (2d) 332 (1951);

Aubuchon et al. v. Frazier et al., 99 Fed. Supp. 985 (1951; U. S. District Court, E. D. Missouri);

Reed v. Murphey et al., 168 Fed. (2d) 257 (1948; C. C. A. 5th), 335 U. S. 865, 69 S. Ct. 105, 93 L. Ed. 410;

Cooper v. Rust, 181 Fed. (2d) 107 (1950; C. C. A. 6th) (certiorari denied 340 U. S. 879, 71 S. Ct. 116, 95 L. Ed. 639);

Noonan v. Fruco Construction Co., 140 Fed. (2d) 633, 634 (1943; C. C. A. 8th);

Walling v. Goldblatt Bros., Inc., 128 Fed. (2d) 778, l. c. 784 (1942; C. C. A. 7th), certiorari denied 318 U. S. 757, 63 S. Ct. 528, 87 L. Ed. 1130;

Kirschbaum Co. v. Walling, 316 U. S. 517, 525, 62 S. Ct. 1116, 86 L. Ed. 1638 (1942);

Maitrejean v. Metcalfe Construction Company et al., 165 Fed. (2d) 571, l. c. 574 (1948; C. C. A. 8th).

A.

Nor is that decision in conflict with the decision of this Court in **Powell v. United States Cartridge Company**, 339 U. S. 497, 94 L. Ed. 1017.

III.

The decision of the Court of Appeals that under the undisputed material evidentiary facts referred to in its opinion petitioners' action against respondent to recover overtime compensation under the Fair Labor Standards Act was barred by Section 9 of the Portal-to-Portal Act (Chapter 52, Section 9, 61 Stat. 88; 29 U. S. C. A., Section 248) was and is clearly right and is not in conflict with any

decision of this Court or of another United States Court of Appeals.

Standard Oil Co. of Cal. v. Johnson, 316 U. S. 481, 62 S. Ct. 1168, 86 L. Ed. 1611 (1942);

Lassiter et al. v. Atkinson Co. et al., 176 Fed. (2d) 984 (1949; C. C. A. 9th);

Kam Koon Wan et al. v. Black, 75 F. S. 553 (1948; D. Ct. Hawaii), affirmed 188 Fed. (2d) 558 (1951; C. C. A. 9th), certiorari denied 72 S. Ct. 49, 96 L. Ed. 32 (1951).

IV.

Where, as here, the evidence deals with undisputed facts the Court of Appeals may ignore the District Court's findings and substitute its own.

Orvis v. Higgins, 180 Fed. (2d) 537 (1950; C. C. A. 2nd), certiorari denied 71 S. Ct. 37, 340 U. S. 810, 95 L. Ed. 595.

ARGUMENT.

I.

The Court of Appeals Did Not Err in Deciding That Respondent Contractor Was Not Employer of Petitioners.

The Court of Appeals held that the Special Master and the District Court erred as a matter of law in holding that the construction guards, petitioners here, were employees of respondent construction contractor, and not of the government, within the meaning of the Fair Labor Standards Act (29 U. S. C. A., Section 203). The undisputed material evidentiary facts forming the basis of the decision of the Court of Appeals are detailed in its opinion. The decision was and is clearly right. **Patton et al. v. Roane-Anderson Company, Inc.** (1951; C. C. A. 6th)*; **Lewis et al. v. Virginia Engineering Co., Inc.,** 80 Fed. Supp. 886, 887 (1947; United States District, E. D. Virginia). Such additional and undisputed facts as are described on pages 5, 6, 7, 27 and 28 of petitioners' Petition For Writ of Certiorari and Brief in Support Thereof, would not have changed the result reached by the Court of Appeals for the reason that the Court did not consider them as material or controlling on the issue as to whether petitioners were respondent's employees. In that connection it is pertinent to observe that petitioners have drawn a number of unauthorized implications from the undisputed evidence. For example, they imply that it was not until after September 30, 1942, that guards were required to file formal application for employment with the United States Government and that the army officers asserted only "considerable" control over petitioners (Petitioners' Petition for Writ of Certiorari and Brief in Support Thereof, last four lines of first paragraph on page 6 and first three lines of second paragraph on p. 7). The undisputed evidence shows that the applica-

* Opinion of United States Court of Appeals, Sixth Circuit, in the Patton case, supra (not yet officially published), is set out in the Appendix.

tions of these petitioners for membership in the construction guard force were all made out on application forms titled "War Department, Office of the Constructing Quartermaster, Application for Employment as a member of the Guard" and were all filed in that office prior to September 30, 1942 (R. 962-964). None of the claims of petitioners was for overtime accruing after September 30, 1942. That was the date the guards were ordered by the Government taken off of Respondent's payroll and were placed on civil service (R. 1168).

Neither respondent nor anyone for respondent had anything to do with the recruiting, selecting, employing, equipping, training, instructing, supervising, promoting, demoting, discharging, or assigning of duties and activities of petitioners in connection with their work as construction guards. All of such matters, after the Government took over the force from the Burns Detective Agency on October 13, 1941, were within the "exclusive" control of the Constructing Quartermaster (R. 889, 903, 905, 946, 952, 962-964, 1038, 1050, 1061-1062).

A.

Neither is the decision of the Court of Appeals on the point as to whether petitioners were employees of respondent in conflict with any of the holdings of the Court in the cases cited on pages 19 and 20 of Petition for Writ of Certiorari and Brief in Support Thereof. Respondent refrains from a discussion of the opinions in those cases. They speak for themselves, and they amply support respondent's position of no conflict with the decision in the instant case. None of these cases involved facts even comparable to the facts in the instant case. On the issue as to whether petitioners were employees of respondent on the particular facts involved, the Court of Appeals in the instant case (192 F. [2d] 241, l. c. 244) ably distinguished the Powell case. See also the Patton

case, supra (See Appendix) involving facts quite similar, if not identical, to those in the instant case and in which the Sixth Circuit Court of Appeals distinguished the Powell case.

II.

The Court of Appeals Did Not Err in Holding That Petitioners Were Not Engaged in Production of Goods for Commerce.

The Court of Appeals held that before a laborer is engaged in "production of goods for commerce" within the meaning of the Fair Labor Standards Act, it must be found that a substantial portion, not merely an incidental part, of his labor was devoted to the production of such goods, and that under the undisputed material evidentiary facts detailed and set forth in its opinion there was but one conclusion, that is, petitioners' duties and activities had only the most tenuous relation to the production of munitions and therefore petitioners were not engaged in "production of goods for commerce" and that the Special Master and the District Court erred, as a matter of law, in reaching a contrary conclusion. The holding of the Court of Appeals was and is clearly right. The undisputed evidence showed that petitioners were local construction guards and it was their duty to protect, guard and watch over the area under construction. The activities, responsibilities and duties of the construction guard force and of the production guard force were separate, distinct and independent of each other. The construction guards, petitioners here, were responsible only for protecting construction and construction personnel (R. 876, 896, 952, 953).

The decision of the Court in **Hartmaier et al. v. Long et al.**, 361 Mo. 1151, 238 S. W. (2d) 332 (1951), and **Aubuchon et al. v. Frazier et al.**, 99 Fed. Supp. 985 (1951; U. S. District Court, E. D. Missouri), indicate quite clearly that

the decision of the Court of Appeals in the instant case, which is in harmony with those authorities on the point under discussion, was and is correct. The guards in the Hartmaier and Aubuchon cases, as here, were construction guards, and not production guards. In both cases production of goods for interstate commerce was being conducted in various ways on the premises. The guarding which plaintiffs did in those cases included some of the instrumentalities used by those engaged in some phase of interstate commerce, but such guarding was held, on facts almost identical with the undisputed facts here, to be **incidental** to the main purposes of their duties, which were to guard the buildings, premises and activities of construction and hence not within the purview of the Fair Labor Standards Act.

A.

Petitioners assert (pp. 16, 28, 29 of their Brief) that the decision of the Court of Appeals that petitioners were not engaged "in commerce" or "in the production of goods for commerce", is in conflict with the decision of this Court in Powell v. United States Cartridge Co., 339 U. S. 497, 70 S. Ct. 755, 758, 94 L. Ed. 1017. Petitioners have not correctly stated the holding of the Court of Appeals when they assert that it held that petitioners were not engaged "in commerce". Surely petitioners do not intend to claim, as they do on pages 16, 28 and 29 of their brief, that they were engaged "in commerce" and that the Court of Appeals erred in holding that they were not engaged "in commerce". The record does not support such a claim. Whether or not petitioners were engaged "in commerce" is not before this Court. The record shows that the Special Master and the District Court found, concluded and ruled that petitioners were **not** engaged "in commerce" (R. 192, paragraph designated 11; R. 194, paragraph designated 2; R. 1128). That ruling was not challenged by any of the parties on the appeal perfected to the Court of Ap-

peals. The Court of Appeals held that the duties of the appellees, petitioners here, had only the "most tenuous relation to the production of munitions" (192 Fed. [2d], Advance Sheet No. 4, l. c. 246), or, in other words, petitioners were not engaged in "production of goods for commerce." That holding is not in conflict with the decision of this Court in the Powell case. The respondent involved in that case was a **production** contractor. It was engaged to operate the Government's plant for the manufacture of certain types and quantities of small arms ammunition. Petitioners in that case were employed in the safety department of the plant and their activities were primarily and solely confined to the **production** of ammunition. There was no **local construction** activities involved in the Powell case.

III.

The Court of Appeals Did Not Err in Holding That Petitioners' Action Against Respondent to Recover Overtime Compensation Under the Fair Labor Standards Act Was Barred by Section 9 of the Portal-To-Portal Act (Chapter 52, Section 9, 61 Stat. 88; 29 U. S. C. A., Section 258).

The Court of Appeals decided that under the undisputed material evidentiary facts mentioned in its opinion that the Special Master and the District Court clearly erred, as a matter of law, in holding that petitioners' action was not barred by Section 9 of the Portal-To-Portal Act (29 U. S. C. A., No. 258).

The decision of the Court of Appeals under the particular facts involved was and is correct and does not conflict with any decision of this Court or of another Court of Appeals. On the contrary, the decision in the instant case is in accord with the decisions of this Court and other Courts of Appeals. **Standard Oil Co. of Cal. v. Johnson,** 316 U. S. 481, 62 S. Ct. 1168, 86 L. Ed. 1611 (1942); **Las-**

siter et al. v. Atkinson Co. et al., 176 Fed. (2d) 984 (1949, C. C. A. 9th); **Kam Koon Wan et al. v. Black**, 75 F. S. 553 (1948; D. Ct. Hawaii), affirmed 188 Fed. (2d) 558 (1951; C. C. A. 9th), certiorari denied 72 S. Ct. 49, 96 L. Ed. 32 (1951).

IV.

District Court's Findings on Undisputed Evidentiary Facts May Be Disregarded by Court of Appeals.

Where, as here, the undisputed evidentiary facts before the District Court are such that the Court of Appeals has a definite and firm conviction that the District Court was mistaken in its findings the Court of Appeals may disregard the District Court's findings and substitute its own and in such a case certiorari to review such action by the Court of Appeals as being in conflict with decisions of this Court or other Courts of Appeals has been denied. **Orvis v. Higgins,** 180 Fed. (2d) 537 (1950, C. C. A. 2nd), certiorari denied, 71 S. Ct. 37, 340 U. S. 810, 95 L. Ed. 595.

CONCLUSION.

The decision of the Court of Appeals in the instant case that the District Court erred, as a matter of law, in making certain findings heretofore mentioned in favor of petitioners and entering a judgment in accordance therewith rests **exclusively** upon **undisputed** evidentiary facts. The question as to whether the decision is right or conflicts with any decision of this Court or other Courts of Appeals must be viewed in the light of the undisputed evidentiary facts. This is so for the reason that where, as here, the evidence (oral and written) deals with **undisputed** facts the Court of Appeals may ignore the District Court's findings and substitute its own, and in such a case certiorari to review the action of the Court of Appeals as being in conflict with decisions of this Court or other Courts of Appeals has been denied. **Orvis v. Higgins,** 180 Fed. (2d)

537 (1950; C. C. A. 2nd), certiorari denied, 71 S. Ct. 37, 340 U. S. 810, 95 L. Ed. 595.

In the instant case the decision of the Court of Appeals upon the undisputed evidentiary facts is clearly right and is not in conflict with any decisions of this Court or of other Courts of Appeals.

Nor is there any new issue of Federal law of public importance tendered by the petition. The decision below turns upon its own peculiar facts. It will affect only the litigants involved. This Court does not grant certiorari to review evidence and discuss specific facts or inferences drawn therefrom, or to give the party defeated in the Court of Appeals another hearing on matters peculiar to a single controversy. **Magnum Import Company v. Franqois Joseph De Spoturnocoty**, 43 S. Ct. 531, 262 U. S. 159, 67 L. Ed. 922 (1923); **Southern Power Co. v. North Carolina Public Service Company**, 44 S. Ct. 164, 263 U. S. 508, 68 L. Ed. 413 (1924).

It is respectfully suggested that the petition for writ of certiorari to the Court below should be denied.

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APPENDIX.

Francis J. Patton, et al.,
Appellants,

v.

Roane-Anderson Company, Incorporated,
Appellee.

United States Court of Appeals, Sixth Circuit.

No. 10,958. December 14, 1951.

On Appeal from the United States District Court for the Eastern District of Tennessee.

Affirming (D. C., E. D. Tenn.; 1948) 14 Labor Cases ¶ 64,245.

Martin Southern (Southern & Southern, on the brief), Knoxville, Tennessee, for Appellants.

E. H. Rayson and R. R. Kramer (Kramer, Dye, McNabb & Greenwood, of counsel), Knoxville, Tennessee, for Appellee.

Before Allen, Martin and Miller, Circuit Judges.

Martin, C. J.: This is an appeal from the dismissal by the United States District Court of a complaint on behalf of 164 workmen against Roane-Anderson Company, Inc., for extra compensation totaling some seven hundred and fifty thousand dollars ($750,000), based upon alleged applicability of the Fair Labor Standards Act of 1938, sections 201 et seq., of Title 29, U. S. C. A., and Executive Orders 9240 (7 F. R. 7159) and 9248 (7 F. R. 7419).

As was found by the District Court, the appellee corporation, by a contract with the United States Government, took over operation of various services in the town of Oak Ridge, Tennessee, situs of Clinton Engineer Works, for a fixed fee compensation. Appellee, in accordance

with the contract, handled payrolls for which it was reimbursed by the United States. One hundred and sixty-two of the appellants were firemen, one was a detective, and the other was a clerk in the auditing department of the appellee company. Pursuant to the contract, the Government expressly reserved control over the firemen and guards, with the power to hire and fire them and to designate their salary and wage schedules. The clerk in the auditing department, alone, was in all respects an employee of appellee.

The firemen worked on twenty-four hour shifts, being on duty twenty-four hours and off duty twenty-four hours. They were paid straight time prior to March 18, 1945, and thereafter they received time and a-half for hours worked in excess of a forty-hour week, their status being changed on that date from a salary to an hourly basis. Their insistence is that, pursuant to the Fair Labor Standards Act, they should have been paid time and a-half prior to March 18, 1945, for all hours worked in excess of forty per week; and that, under Executive Order 9240, as amended by Executive Order 9248, they should have received double time for the equivalent of "7th consecutive days, their duty shift of twenty-four hours commencing before and ending after midnight, with the result that they are on duty a part of every day."

The other two appellants claimed for overtime as well as for double time.

After the case had been tried, but before it had been decided, the appellee company moved to reopen the case in order that the Portal-to-Portal Act of 1947, which had been enacted in the interim, could be set up as an additional defense. The motion was properly allowed over the opposition of appellants and additional proof was introduced to show that appellee had acted in good faith and in accordance with Government regulations and directives in its payroll policies. The District Judge deemed

it unnecessary to consider this additional defense and the proof introduced under it, for the reason that he based his denial of appellants' claims on the reasons stated in his opinion in **Young v. Kellex Corporation**, 82 F. Supp. 953 [14 Labor Cases ¶ 64,244] (D. C. E. Tenn.), wherein it was held that the atomic bomb is not an article of commerce within the scope of the Fair Labor Standards Act and that an employee could not recover for overtime and attorney's fees under such Act, or by virtue of it or of the aforementioned Executive Orders, for his work as transportation manager in charge of a motor pool at Oak Ridge, Tennessee. The opinion of the District Judge pointed out that the parties in the instant case had stipulated that the sole purpose and function of the project "during the period involved in this suit, was to engage in research, experimental work and development and to produce an atomic bomb which was for the use of the United States of America out of the State of Tennessee."

[Employees Not Engaged in Production of Goods for Commerce.]

This Court, in **Selby v. J. A. Jones Construction Co.**, 175 F. (2d) 143 [16 Labor Cases ¶ 65,177] (C. A. 6), affirmed the judgment of the trial judge, Honorable George Taylor, United States District Judge, in holding upon the basis of his earlier opinion in **Young v. Kellex Corporation**, supra, that the production of an atomic bomb during wartime is not the "production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938. Judge Hicks said (175 F. [2d] 146, 147):

> "It is urged that materials designed eventually to become component parts of the bomb, brought from beyond the State to Oak Ridge, there to be processed and sent to destinations beyond the State, were in the field of interstate commerce. This contention does violence to the stipulation between the parties. These

materials were at all times the property of the United States and under the supervision and control of the Army, and were at no time in the custody of a common carrier. Simply stated, the Government brought its own property, in its own possession and under its own control, to Oak Ridge and there processed it for its own use, in its own establishment, designed and constructed for that purpose by its own agents, and then sent it, for its own purposes, under its own control, beyond the State to destinations fixed by it. No element of interstate commerce was involved. There was no buying or selling of these articles, no commercial intercourse between the United States and third parties; no traffic, no market, and no ultimate consumer except the Government itself. There could be no traffic in bomb materials. None of these activities fall under the commerce clause."

[U. S. Supreme Court's Decision in Powell Case Distinguished.]

The contention is made that **Powell v. United States Cartridge Co.**, 339 U. S. 497 [18 Labor Cases ¶ 65,759], has destroyed the authoritative effect of the decision of this Court which has just been discussed. We think not. It is true that the Supreme Court held that the Fair Labor Standards Act applies to employees of a private contractor operating a Government-owned munitions plant under a cost-plus-a-fixed-fee contract with the Government and that the transportation of munitions outside the state of production is commerce within the meaning of the Act, even though the munitions were produced and transported for delivery into the actual physical possession of the United States as their ultimate user and consumer and not for sale or exchange. In the **Powell** case, it was found that, in form and substance, the contractor was the employer within the meaning of the Fair Labor Standards

Act, being authorized by the contract to "employ all persons engaged in the work." It was further pointed out that the contract provided that the employees would be subject to the control of and would be constituted employees of the contractor; that the contractor was an independent contractor, "in no wise an agent of the Government"; and that the contract was "replete with references to the persons employed as the 'employees of the contractor.'" The opinion writer observed further that the contract evidenced a policy of the Government to refrain, as much as possible, from manufacturing and to rely rather on the experiences of American industry so as not to weaken our system of free enterprise. The comment was made that, though the Government must essentially supervise expenditures made by it, such supervision did not prevent "the placing of managerial responsibility upon independent contractors."

The same situation, calling for similar reasoning, does not prevail in the present case, inasmuch as, here, the Government did not intend to refrain, nor did it refrain, from supervision of the operations in which the appellant employees were engaged. The appellee contractor exercised no supervisory authority over appellants and it was expressly stated in the contract between the Government and appellee that the duties of the latter with relation to the appellants was limited to paying their wages. Moreover, protection from fire and crime is a normal governmental function and activity. The contract did not designate Roane-Anderson Company, Inc., as an independent contractor, but made the following distinct provision:

> "In the operation of the facilities under this contract, and in the procurement of any and all supplies, materials, equipment necessary to the performance of the work hereunder, **the Contractor shall act as Agent for the United States of America**, it being understood and agreed, however, that all personnel and labor

shall be and remain for all purposes the employees of the contractor, exclusively, it being understood and agreed that the duties and functions of all such persons will be performed under the sole supervision and direction of the Contractor; **provided, however, that employees engaged in the fire, guard and police patrols and forces shall perform their respective duties in accordance with the instructions and under the supervision of the Contracting Officer or his duly authorized representative."** (Emphasis supplied.)

The employment situation of the appellant firemen and policemen distinguishes them, as shown by the foregoing clause, from the status of the regular personnel employed by the contractor. We think, therefore, that **Powell v. United States Cartridge Company,** supra, is clearly distinguishable from the case presently before us.

[Claims Also Barred by Good Faith Reliance Defense.]

In the recent case of **Fruco Construction Co. v. McClelland,** ... F. (2d) .... [20 Labor Cases ¶ 66,611] (C. A. 8), decided November 8, 1951, the Court of Appeals for the Eighth Circuit held that the Fair Labor Standards Act does not apply to construction guards at an ordnance plant constructed by a contractor under a cost-plus-a-fixed-fee contract with the United States, even though as each building was completed an operating company occupied it for manufacturing munitions for the Government, inasmuch as the duties of the construction guards were purely incidental to protection of the manufacturing in progress. Therefore, the court considered that the guards were not engaged in activities necessary to production of goods for interstate commerce within the meaning of the Act. Moreover, upon the same reasoning of the Court of Appeals that Section 9 of the Portal-to-Portal Act barred recovery by the construction guards of overtime compensation, we think that the appellants in the instant case are barred in their claims for overtime compensation.

Section 9 of the Portal-to-Portal Act of 1947 (29 U. S. C. 258), provides:

> "In any action or proceeding commenced prior to or on or after May 14, 1947, based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healy Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

We think the facts disclosed in the record demonstrate that appellee acted in "good faith" in relying upon governmental orders, rules and regulations in making its wage payments. It complied with its contract with the Government in all such respects. See **Lassiter v. Guy F. Atkinson Co.**, 176 F. (2d) 984 [17 Labor Cases ¶ 65,311] (C. A. 9, 1947). Compare **Rogers Cartage Co. v. Reynolds**, 166 F. (2d) 317 [14 Labor Cases ¶ 64,317] (C. A. 6).

[Ruling.]

The judgment of the District Court is affirmed.